

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

T.E. BRIGGS CONSTRUCTION COMPANY, INC.

and

Cases 19-CA-28619
19-CA-28744
19-CA-28898

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 302

On Behalf of the General Counsel,
Martin M. Eskenazi, Esq.
Seattle, Washington.

On Behalf of the Charging Party,
David Hannah, Esq.
Cedar River Law Professionals, PLLC
Covington, Washington.

On Behalf of Respondent
Aaron A. Roblan, Esq.,
Jackson Lewis, LLP
Seattle, Washington.

DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge. This case was tried in Seattle, Washington on December 16-18, 2003, upon General Counsel's Amended Consolidated Complaint¹ that alleged T.E. Briggs Construction Company, Inc., (Respondent) violated Section 8(a)(1) and (3) of the Act by telling an employee that he would not be re-hired because he was Union, by threatening an employee by lifting a rock and appearing to throw it at him because of the employee's Union activity, by refusing to offer reinstatement to Steve Scheffer, by disparately treating Union job applicants and by failing to hire or consider for hire Tom Stuart, Tom Kennedy, Mark Sandy, Henry Arnoux, Ron Dahl, Dan Taylor and Daren Konopaski because of their union activity. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

¹ At the hearing General Counsel moved to amend the Amended Consolidated Complaint at paragraph 8(b) to correct the date to July 7, 2002 and to add Daren Konopaski as an alleged discriminatee. I granted General Counsel's motion.

Findings of Fact

I. Jurisdiction

Respondent, a Washington State corporation with an office and place of business in Edmonds, Washington, has been engaged in the construction business. During the past 12 months, Respondent in conducting its business operations purchased and caused to be transferred to its facilities within the State of Washington, goods and materials valued in excess of \$50,000 directly from sources outside the State of Washington, or from suppliers within Washington State which in turn obtained such goods and materials from sources outside the State of Washington. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Union of Operating Engineers, Local 302 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. The Issues

1. Did Respondent violate Section 8(a)(1) of the Act by:

- a. Telling an employee that he would not be re-hired because he was Union?
- b. Threatening an employee by lifting a rock and appearing to throw it at him because of the employee's Union activity?

2. Did Respondent violate Section 8(a)(1) and (3) of the Act by refusing to offer reinstatement to Steve Scheffer, by disparately treating Union job applicants and by failing to hire or consider for hire Tom Stuart, Tom Kennedy, Mark Sandy, Henry Arnoux, Ron Dahl, Dan Taylor and Daren Konopaski because of their union activity?

III. Alleged Unfair Labor Practices

A. The Facts

1. Introduction

Respondent is an underground utility contractor. In the course of its business, Respondent excavates trenches and installs main line pipe, storm and water pipe and sewers into trenches in residential subdivisions. Respondent employs pipe-layers, operators and laborers. Pipe-layers set the line and grade for pipe that is put into trenches. Operators run the equipment that dig trenches. Laborers perform a multitude of functions, including cleaning catch basins, raking and shoveling, picking up garbage and supporting the pipe laying operation. The record reflects that there is much cross over among the job duties of pipe-layers, operators and laborers. Tracy Briggs (Briggs) is the owner and president of Respondent. Ronald Smith (Smith) is Respondent's superintendent of construction. Douglas Ross (Ross) is Respondent's project manager. Cody Walker (Walker) is Respondent's estimator. Ken Satterfield (Satterfield), William Leady (Leady) and Kelly Daniels (Daniels) are Respondent's foremen.²

² In its Answer, Respondent admitted, and I find, that Briggs, Smith, Ross, Walker, Satterfield, Leady and Daniels are supervisors within the meaning of Section 2(11) of the Act

2. The Refusal to Rehire Steven Scheffer

Steven Scheffer (Scheffer) was employed by Respondent as a pipe-layer, equipment operator and laborer from April 1, 2002 through September 10, 2002³. Scheffer was also an organizer for the Union at the time of his employment with Respondent. In the course of his employment with Respondent Scheffer performed pipe laying duties, laborer's work and operated various types of equipment, including excavators, hole packers, loaders, dozers and backhoes for 35 of the 118 days he worked for Respondent. Between April 1 and July 18 Scheffer received numerous compliments from his supervisors concerning the quality of his work. During this period of time Scheffer's supervisor Leedy said Scheffer was a good excavator operator and should be running equipment full time for Respondent. When Scheffer admitted he made a mistake laying some pipe, Briggs told Scheffer he appreciated guys like him and that Scheffer was the type of guy they would like to keep around. On June 25 Briggs wrote Scheffer a letter of recommendation and gave him a \$1.50 and hour raise.

On April 25, Scheffer was working at Respondent's Madalyne Lane project with employees, Jim Nicholson, Sean Ryan, and Joe Primacio. Foremen Leady and Ken Tannehill (Tannehill) were also present. Around noon two business agents from the Union came to the job site and spoke to Jim Nicholson (Nicholson, a member of the Union. After the conversation with the Union agents, Nicholson left the job. Later Leady was asked by Sean Ryan what happened to Nicholson. Leady replied that the Union agents asked Nicholson to leave the job since Respondent was non-union. Leady said that Briggs was going to be upset because he paid Jim [Nicholson] to leave the Union when he hired him.⁴ Later that day Briggs and Smith came to the jobsite. Briggs asked Tannehill if he was union. Tannehill replied, no. Briggs turned to Scheffer and asked if he was union or if he had been a member of a union. Scheffer said, no. Briggs then said, "Good, then I won't have to worry about losing you."⁵

On July 18, Scheffer was working at Respondent's Vineyard jobsite. At about 6:45 a.m., Amir Gadiwalla (Gadiwalla), a person of East Indian descent and the Director of Organizing for the Union, spoke to Respondent's employees about the Union. Gadiwalla handed out Union literature and stickers to the employees. Scheffer put a Union sticker on the center of his hard hat that said "United We Bargain, Divided We Beg, Local 302." After Gadiwalla left the jobsite, Respondent's foreman, Satterfield, told Scheffer and other employees that he had been a member of the Union and nearly starved to death waiting on the out of work list. He said the Union was a rip off and the only reason that "fucking sand nigger was out there telling us union wise was because he had a full-time union job and basically he was just out there telling us lies and bullshit." Later that day Satterfield told Scheffer and Jake Ford that, "if we wanted to be union and work union, we should go work for a union company because T.E. Briggs Construction would never be union." Satterfield also told Scheffer and Ford that he was trained in the Army to kill people like Amir. Later that day Satterfield asked Scheffer what the sticker on his hard hat meant. Scheffer thereafter openly engaged in union organizing activities while working for Respondent including, speaking to employees about the Union, passing out Union literature on the jobsites and wearing Union insignia on his clothing while at work.

³All dates herein refer to 2002 unless otherwise noted.

⁴ General Counsel's Exhibit 3 is Nicholson's payroll record for August 14, 2001, which reflects reimbursement from Respondent for \$900 in Union dues.

⁵ Briggs denied interrogating Tannehill or Scheffer. I credit Scheffer's testimony. I found Briggs testimony vague and inconsistent particularly regarding his testimony concerning paying Keopenick for withdrawing from the Union.

On August 9, during the 10:00 a.m. coffee break on Respondent's Sunlit jobsite, Scheffer was talking to Respondent's employees Ford and Ryan about wages and working conditions under the Union contract. Satterfield came up and told Scheffer he was not allowed to talk about the Union on the job, that he was not allowed to possess Union literature on the job and that he would have to get the Union contract off the site. Satterfield said he was operating under Brigg's authority. Later that day, Satterfield told Scheffer that Scheffer could no longer run equipment for Respondent. When Scheffer asked why, Satterfield replied that's what Tracy wanted. When Scheffer asked if this had anything to do with the Union and his Union activities, Satterfield said, yes it did. Later that day when Scheffer saw a laborer, Ryan, operating equipment, Scheffer asked Satterfield why Ryan was allowed to run equipment when he could not, Satterfield replied, "you stirred the pot."

On August 13 at the Sunlit project near the end of the day, Satterfield told Scheffer that he could no longer drive the company truck to and from the job site. Scheffer had been driving the company truck on a daily basis prior to this time. When Scheffer asked if this had anything to do with his Union activities, Satterfield responded, "You stirred the pot, Steve. You and I both know what it's about."

On September 6 at about 1:30 p.m. on the Sunlit jobsite, Satterfield told Scheffer that there was no more work for him on the job that day but the rest of the crew would be working. Scheffer watched the crew work for over an hour doing curb grade, work that Scheffer had done in the past.

On September 9, Scheffer went to the Sunlit jobsite but was told by Satterfield that there was no work for him although the rest of the crew would be working. Scheffer was told to report to the Sunlit jobsite on September 10. Scheffer left the Sunlit jobsite and went to Respondent's office where he participated in an unfair labor practice strike and walked a picket line. The picket signs stated that Respondent violated federal law and had committed unfair labor practices.⁶

On September 10, Scheffer reported to the Sunlit job at 7:00 a.m. and told Satterfield he was going out on strike until the unfair labor practices had been remedied.

Scheffer remained on strike until November 13 when he made an unconditional offer to return to work in a letter of November 13.⁷ On November 22, a copy of the November 13 letter was faxed to Respondent.⁸ On December 3, Gadiwalla called Respondent's office and advised a clerk to bring to Brigg's attention that Scheffer had made an unconditional offer to return to work. Scheffer made additional offers to return to work on July 18, August 4, September 4, and October 15, 2003. On July 21, 2003, Scheffer received a letter from Respondent that advised there was no pipe laying work available.⁹

In late May or early June 2003, Respondent hired Jim Miller (Miller) as a laborer and Charles McJunkin (McJunkin) as an operator. In January or February 2003 Briggs first spoke to McJunkin at a jobsite. Respondent had previously worked at this jobsite and there were issues about Respondent's placement of fill. McJunkin was the operator at that site, working for

⁶ Prior unfair labor practice charges were pending at the time Scheffer was on strike. The charges were settled after the trial opened in 2003 before this trial commenced.

⁷ General Counsel's Exhibit 7.

⁸ General Counsel's Exhibit 8.

⁹ General Counsel's Exhibit 9.

another employer. In resolving the issue of Respondent's placement of the fill, Briggs observed McJunkin operating equipment at the site. McJunkin asked Briggs if he was hiring and Briggs said no. Later in March or April McJunkin again approached Briggs and gave him his phone number. Briggs first considered McJunkin for hire in May 2003. Miller was hired in June 2003 after he approached Respondent's superintendent Ron Smith about a job.

3. The February 11 and March 14, 2003 Refusal to Allow Scheffer and Tom Stuart to Apply for Work.

On February 11, 2003, Scheffer and Union member Tom Stuart (Stuart) went to Respondent's Edmonds, Washington office. Stuart was wearing a hat with Local 302 insignia on the front. As Scheffer and Stuart approached the office door, Jeremy Ball, Respondent's estimator, ran to the front door and locked it. There was a no hiring/not accepting applications sign in the office window. Scheffer had gone to Respondent's office to unconditionally offer to return to work and Stuart had gone to apply for work as an operator.

On March 14, 2003 Todd Werner (Werner), an unemployed Union member went with Scheffer and Stuart to Respondent's office in Lynnwood, Washington. When Werner approached Respondent's office, both Scheffer and Stuart were out of sight. Werner was wearing no Union insignia. Werner was allowed to walk into the office without difficulty and asked for a job application. A person advised that Respondent was not hiring and provided Werner with a business card.

On March 14, 2003, after Werner's visit, Scheffer and Stuart went to Respondent's Lynnwood, Washington office to apply for work. Stuart was again wearing his Union hat. Respondent's estimator, Walker, met Scheffer and Stuart at the office door. Walker said that the office was closed, that Respondent was not hiring and that Scheffer and Stuart were not welcome there.

4. The June 6, 2003 Refusal to hire or Consider for Hire Tom Kennedy, Mark Sande, Henry Arnoux, Ron Dahl, Dan Taylor and Daren Konopaski.

On June 6, 2003, Union organizer Todd Hassing (Hassing) went to Respondent's Ash Way jobsite and spoke with Respondent's foreman, Kelly. Hassing said that he was an equipment operator looking for work. Kelly said that Respondent was going to hire a crew within the month since they had just picked up a new job. Kelly told Hassing he had to go through Respondent's office as all hiring was done at the office. Kelly then gave Hassing Respondent's general superintendent Ron Smith's business card and told Hassing to call the office. Hassing immediately called Respondent's office and spoke to an individual who identified herself as Kerry. Hassing told Kerry he had spoken to Kelly who said Respondent was going to hire a pipe crew but that all hiring was done at the office. Kerry said that Briggs did all of the hiring. Hassing asked if he could come in and fill out an application. Kerry said he could and gave Hassing driving directions. When Hassing got to Respondent's office, he observed a sign in the window that said Respondent was not hiring or taking applications. Hassing went into the office where Cody Walker was present. Hassing spoke to Walker and said he was there to fill out an application. Walker handed him an application and said, "You can either take it with you or you can fill it out here. Hassing filled out the application in the office and had the clerk make a copy.¹⁰ While Hassing was filling out the application, Walker

¹⁰ General Counsel's Exhibit 12.

asked him what he did. Later Hassing called Briggs and Briggs told him Respondent was not hiring.

Meanwhile, on June 6, 2003 Scheffer, Tom Kennedy (Kennedy), Mark Sande (Sande), Henry Arnoux (Arnoux), Ron Dahl (Dahl), Dan Taylor (Taylor) and Daren Konopaski (Konopaski)¹¹ went to Respondent's Lynnwood, Washington office to apply for work as operators. As the men approached the office door, Walker met the first applicant, Sande, at the front door and blocked his entry into the building. Walker said Respondent was not hiring or accepting applications. After some discussion about whether Respondent operated out of this building, Walker added that they were not welcome there and asked them all to leave.

On June 12, 2003, Janet McKinney (McKinney) went to Respondent's Lynnwood, Washington office to apply for work. She was wearing no Union insignia. McKinney walked into Respondent's office without difficulty and was told that the person doing applications was gone until the next week. When McKinney asked if she could back, she was told yes. When McKinney came back on June 24, 2003, she entered Respondent's office without difficulty and was told Respondent was not hiring.

5. The July 7, 2003 Statement that Scheffer Would not be Rehired because He was Union and the Threat to Throw a Rock at Scheffer.

On July 7, 2003, Scheffer went to Respondent's Ash Way jobsite. Scheffer parked his car on a public road and watched the work. Respondent's foreman, Leady, approached Scheffer and said there wasn't much happening there that day. After Scheffer's conversation with Leady, Hassing, an organizer for the Union, arrived at the jobsite and both men sat on the hood of Scheffer's car. At that point Respondent's superintendent, Ross, came up to Scheffer and Hassing. Ross told Scheffer and Hassing that they were on private property. Scheffer replied that they were on a public road with no "no parking" signs or construction cones. Ross then surrounded Scheffer's car with construction cones and said, "Now, you're in my work area. Get out of here or I'm calling the cops." Scheffer then asked Ross why Respondent had hired a new guy¹² and had not brought Scheffer back to work. Ross replied, "Because I was a Union member and I was an operator." When Scheffer said he would have been happy to do laborer's work, Ross said, "There's no fucking way we're going to hire you back. You're Union." After exchanging a few epithets, Ross walked away from Scheffer's car, bent over and picked up a rock and made a throwing motion in Scheffer's direction but did not release the rock. As Ross walked away he said, "You're fucking lucky. Get the hell out of here."¹³

¹¹ There was competent testimony that each of the applicants was a qualified equipment operator.

¹² The employee who was performing laborer's work was Jim Miller. Scheffer also observed new equipment operator Chuck McJunkin working on Respondent's jobs

¹³ Ross denied saying Scheffer would not be rehired because he was Union and denied making a throwing motion with a rock toward Scheffer. I credit Scheffer's testimony. Ross was a non-responsive inconsistent witness. Ross initially denied putting cones around Scheffer's car but on cross-examination admitted doing so. Leady admitted he did not observe the entire conversation between Ross and Scheffer, therefore he was not in a position to corroborate Ross' version of the facts. On the other hand Hassing was present and corroborated Scheffer's version of the facts.

B. The Discussion

1. The Alleged 8(a)(1) Conduct¹⁴

5 General Counsel has alleged that Respondent violated Section 8(a)(1) of the Act by threatening not to rehire Scheffer because of his union activity and by threatening him with physical violence because of his union sympathy.

10 It is well established that an employer who threatens not to hire or rehire an employee due to union activity violates the Act. *Structural Finishing, Inc.*, 284 NLRB 981, 982 (1987); *Starcon Inc.*, 323 NLRB 977 (1997); *Industrial Construction Services*, 323 NLRB 1037, 1039 (1997). Here, on July 7, 2003, Respondent, through superintendent Ross, told Scheffer he would not be rehired because he was union. This statement violated Section 8(a)(1) of the Act.

15 It is also the case that an employer who threatens employees with physical violence violates the Act. The Board found an employer who threatened to throw rocks at a union organizer violated Section 8(a)(1) of the Act. *Zarcon, Inc.*, 340 NLRB No 145, slip op at page 8 (2003). On July 7, 2003, at the same jobsite where Ross told Scheffer he would never be rehired because he was union, Ross picked up a rock and made a throwing motion in Scheffer's
20 direction. Like the threat to throw rocks in *Zarcon*, Ross' feigning to throw a rock at Scheffer was a threat of physical violence and came on the heels of his statement that Respondent would not rehire Scheffer because he was union. Ross' action violated Section 8(a)(1) of the Act.

25 2. The Refusal to Offer Reinstatement to Scheffer

Counsel for the General Counsel contends that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to offer Scheffer reinstatement after he made an unconditional offer to return to work from an unfair labor practice strike. Respondent counters that Scheffer was not
30 an unfair labor practice striker since he gave no reasons to indicate he was an unfair labor practice striker, that Scheffer abandoned his employment with Respondent by accepting regular and substantial equivalent employment elsewhere, and that there was no available work for Scheffer to perform upon his offer to return to work.

35 It is settled that both economic strikers and unfair labor practice strikers retain their status as "employees" under Section 2(3) of the Act. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). As a result, an employer violates Section 8(a)(3) and (1) of the Act by failing to immediately reinstate strikers upon their unconditional offer to return to work,

40 ¹⁴ In its brief Charging Party alleged that Respondent violated Section 8(a)(1) of the Act by locking its office door on February 11, 2003 and barring applicants from entering its office on June 6, 2003 and by telling employees they were not welcome at its office on March 14 and June 6, 2003. General Counsel did not allege these acts as independent violations of Section 8(a)(1) in the Amended Consolidated Complaint and did not seek to amend to complaint to
45 allege these Acts as violations of Section 8(a)(1) of the Act. Neither in his brief did Counsel for the General Counsel allege these acts were violations of Section 8(a)(1) of the Act. It is well established that charging party cannot enlarge upon or change the General Counsel's theory of the case. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991). While an unpleaded but fully litigated matter may support an unfair labor practice finding, I find that the matters alleged by charging
50 party were neither pled nor fully litigated and I will make no findings that unfair labor practices were committed. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

unless the employer establishes a legitimate and substantial business justification for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Marchese Metal Industries*, 313 NLRB 1022, 1032 (1994); *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), *enfd.*, 414 F. 2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

In *Zimmerman Plumbing and Heating Co., Inc.*, 339 NLRB No. 138 slip op at 6 (2003) the Board held that a former striker who makes an unconditional offer to return to work must be reinstated to substantially equivalent positions and to any non-equivalent positions requested for which he may be qualified.

Scheffer made unconditional offers to return to work on November 13, November 22 and December 3, 2002 as well as on July 18, August 4, September 4 and October 15, 2003.

The record reflects that Scheffer was hired by Respondent as a pipelayer. During the course of his employment with Respondent, however, Scheffer performed other duties including equipment operation and laborer's work. Concerning Scheffer's duties working on pipelaying crews, Superintendant Ross said Scheffer was a piplayer/laborer. Ross said a laborer and pipelayer, "basically have the same multiple tasks. Labor work could be-a Laborer and a Pipe Layer do a lot of the same things. A Laborer may use a shovel and a broom. A Pipe Layer will use a shovel and a broom with other tasks, too, to go with it."¹⁵ Respondent asserts that Scheffer said he considered laborer's work below him. However, there is no evidence he ever refused to perform such work or that he indicated he would not perform such work upon reinstatement.

There is also evidence that Scheffer frequently operated equipment.¹⁶ The record is replete with evidence of Scheffer's operation of many types of heavy machines. Other than one occasion when Briggs told Scheffer not to strike the ground so hard with the bucket of the backhoe¹⁷, Scheffer regularly received compliments from his supervisors for the quality of his operator work. Scheffer was told by supervisor Leedy he should be operating equipment full time for Respondent. Briggs assertion that Scheffer was not qualified to operate machinery is without support in the record.

Respondent filled the positions of operator and laborer in late May 2003, after Scheffer made an unconditional offer to return to work. These are substantially equivalent positions for which Scheffer was qualified.

Moreover, there is considerable evidence that anti-union animus motivated Respondent's failure to offer Scheffer reinstatement. Briggs interrogated employees about their union membership, Satterfield told employees if they wanted to be union they should work for a union company, Satterfield said he was trained to kill people like Union director of organizing Gaddiwalla, Satterfield told Scheffer he could not have Union literature on the jobsite, Satterfield told Scheffer he could not operate Respondent's equipment because of his union activity and

¹⁵ Transcript at page 475.

¹⁶ While Respondent attempted to minimize Scheffer's use of equipment to clean up chores at the end of the day, the record is clear that Scheffer operated equipment at various times while on the job. Indeed, when Briggs admonished Scheffer for striking the ground too hard with the backhoe, Scheffer was operating equipment during the workday.

¹⁷ Briggs did not remove Scheffer from operating the backhoe and gave no direction to prohibit him from operating heavy equipment.

Ross told Scheffer he would not be rehired because he was Union and threatened Scheffer with a rock.

Unless Respondent can establish a legitimate and substantial business justification for failing to reinstate Scheffer after November 13, 2002 to an available job for which he was qualified, General Counsel has established Respondent has violated Section 8(a)(1) and (3) of the Act.

In its defense, Respondent argues that *Enterprises Contracting Corp.*, 334 NLRB 57 (2001) provides guidance for the proposition that Scheffer was not an unfair labor practice striker since he did not give reasons for going on strike. I note initially that the judge in *Enterprises Contracting* found that there were no underlying unfair labor practices to give rise to an unfair labor practice strike. Thus, the remainder of his decision regarding intent is *dicta*. The judge found further that there was no evidence of employees' intent concerning the purpose of the strike, as expressed at the time it occurred:

The requirement that the General Counsel introduce evidence of employees' expressions "at the time of the relevant events" is a minimal one, especially since employer representatives are seldom present when such expressions are made. Except for the testimonies of Montoney and Huff about what happened before and after the June 2 union meeting, however, the General Counsel offered only the type of evidence that the Board rejected in *Thorpe*--the employees' "subjective reasons for striking, as asserted for the first time at the hearing."¹⁸

Respondent's reliance on *Enterprises Contracting* is misplaced. Here there is evidence of Scheffer's intent as expressed at the time of the relevant events. On September 10, Scheffer reported to the Sunlit job at 7:00 a.m. and told his supervisor, Satterfield, he was going out on strike until the unfair labor practices had been remedied. The previous day, Scheffer had walked a picket line in front of Respondent's office where picket signs were displayed stating that Respondent violated federal law and had committed unfair labor practices. Scheffer need not provide a reasoned explanation for actions. The only requirement is evidence of employees' expressions at the time of the relevant events. Here Scheffer put Respondent on notice that he was going on strike to protest unfair labor practices. I find that Scheffer was an unfair labor practice striker as of September 10, 2002.

Respondent takes the position that Scheffer abandoned his right to reinstatement by Respondent.¹⁹ The Board has held in *Zimmerman Plumbing*, 334 NLRB 586, 588 (2001) (*Zimmerman I*) that:

¹⁸ *Enterprises Contracting Corp.* at slip op page 33.

¹⁹ At the hearing, I precluded Respondent from questioning Scheffer about his interim employment on the ground that it was irrelevant. Assuming, *arguendo*, that Respondent established Scheffer had taken other substantially equivalent employment, there is overwhelming evidence that Scheffer did not abandon his employment with Respondent. It must be remembered that Scheffer was a "salt", employed by the Union with permission to take jobs with non-union employers, for the purpose of organizing their employees. Thus, even if Scheffer had taken other employment as a "salt" he would have been available to return to work with Respondent. Moreover, Scheffer's continued statements of his availability to return to work with Respondent from November 13, 2002 through October 15, 2003, belie any intent on his part to abandon his employment with Respondent.

A former striker awaiting reinstatement may accept interim employment elsewhere. Indeed, the Board has recognized that the right to seek interim employment is a vital adjunct to the exercise of the right to strike and is itself protected activity. See *Christie Electric Corp.*, 284 NLRB 740, 759 (1987). Accepting interim employment normally will have no effect on a former striker's reinstatement rights. One exception is that if a former striker accepts other "regular and substantially equivalent employment," within the meaning of Section 2(3), then he forgoes his reinstatement rights with the employer. See *Marchese Metal Industries*, 313 NLRB at 1028-1031 (1994); *Little Rock Airmotive, Inc.*, 182 NLRB 666, 667 (1970). Determining whether a former striker's interim employment constitutes "regular and substantially equivalent employment" cannot be answered by a "mechanistic application of the literal language of the statute." *Little Rock Air Motive, Inc.*, 182 NLRB 666, 667 (1970). Thus, while the Board compares the terms and conditions of the striker's interim job to his prestrike job, the Board ultimately gives controlling weight to whether the "striker intended to abandon his employment with the employer by accepting interim employment with another employer." *Marchese Metal Industries*, 313 NLRB at 1028-1031 (1994). See also, *Rose Printing Co.*, 304 NLRB at 1076 fn. 3. Accord: *Alaska Pulp Corp.*, 326 NLRB 522, 524 (1998), enfd. in part and remanded in part sub nom. *Sever v. NLRB*, 231 F. 3d 1156 (9th Cir. 2000). The Board presumes that the striker did not intend to forfeit his reinstatement rights; the burden is on the employer to prove otherwise. See *Marchese Metal Industries*, 313 NLRB at 1028-1031 (1994).

After remanding the case to the judge, in *Zimmerman Plumbing and Heating Co., Inc.*, 339 NLRB No. 138 (2003) (*Zimmerman II*), the Board affirmed the judge who found that employee O'Brien had not abandoned his employment by taking interim employment elsewhere, noting that O'Brien, despite his higher paying and substantially equivalent interim employment, had continued to express interest in his employment with the Respondent.

Finally, Respondent contends that after November 13, there was no available work for which Scheffer was qualified. While Respondent admits that in late May or early June 2003, it hired Miller as a laborer and McJunkin as an operator, it argues that Scheffer was underqualified to be an operator and had expressed no desire to work as a laborer. As noted above, I have found Scheffer was qualified to perform work as both an operator and laborer.

I find Respondent's failure to reinstate Scheffer was motivated by his union activity and violated Section 8(a)(1) and (3) of the Act.

3. The Failure to Hire or Consider for Hire the Union Applicants

Counsel for the General Counsel argues that Respondent discriminatorily failed to hire and failed to consider Union applicants for hire on February 11, March 14, and June 6, 2003. Respondent takes the position that it did not violate the Act since the Union applicants' conduct removed them from the protection of the Act, there is no evidence that they were qualified to fill available positions, Respondent was not hiring at the time they applied, there is no evidence anti-union animus motivated Respondent and Respondent's non-discriminatory hiring policy would have precluded the Union applicants from being considered for hire.

In *FES, A Division of Thermo Power*, 331 NLRB 9 (2000) the Board promulgated a test to establish a discriminatory refusal to hire. General Counsel must show:

- (1) That the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that

the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *FES* slip op. page 4.

The employer has the burden of proof to show that the applicant did not meet its criteria for the position, was unqualified for the position or was not as qualified as others who were hired. *FES*, slip op. page 6.

In refusal to consider for hire cases the Board in *FES* established the following test:

To establish a discriminatory refusal to consider, pursuant to Wright Line, *supra*, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *FES* slip op. page 10.

a. Tom Stuart

Counsel for the General Counsel argues that Respondent both failed to hire and failed to consider Stuart for hire. On February 11 and March 14, 2003, Stuart attempted to apply with Respondent for a position as an operator. While there is no doubt that Stuart was a qualified operator, there is insufficient evidence that Respondent was hiring or had concrete plans to hire any operators in February or March 2003. Counsel for the General Counsel argues that Respondent was considering McJunkin for hire during the January to March 2003 period. However, the record reflects that it was McJunkin who was lobbying for a job with Respondent and until mid-May Briggs consistently told McJunkin Respondent was not hiring. I find that General Counsel has failed to establish a *prima facie* case that Respondent discriminatorily refused to hire Stuart since there is no evidence Respondent was hiring or had concrete plans to hire on February 11 or March 14, 2003. *FES, supra*.

With respect to the allegation that Respondent failed to consider Stuart for hire, there is some evidence that Respondent gave non-union applicants greater access to Respondent's office than union applicants. Counsel for the General Counsel argues non-union identified applicants Werner, Hassing and McKinney were each given access to Respondent's office and Hassing was allowed to fill out an application. There is no evidence Respondent was aware that Werner, Hassing or McKinney were union members at the time they went to Respondent's office or at the time they were told Respondent was not hiring.

When Stuart and Scheffer approached Respondent's office on February 11, 2003, wearing Union insignia, the door was locked. When Stuart and Scheffer went to Respondent's office on March 14, 2003, wearing Union insignia they were told by Walker they were not welcome and to leave the property.

In addition, the record is replete with evidence of anti-union animus. Not only were Scheffer and Stuart told they were not welcome at Respondent's office, Briggs interrogated employees about their union membership, Satterfield told employees if they wanted to be union they should work for a union company, Satterfield said he was trained to kill people like Union director of organizing Gadiwalla, Satterfield told Scheffer he could not have Union literature on

the jobsite, Satterfield told Scheffer he could not operate Respondent's equipment because of his union activity and Ross told Scheffer he would not be rehired because he was Union and threatened Scheffer with a rock. I find that Counsel for the General Counsel has established a prima facie case under FES that Respondent discriminatorily failed to consider Stuart for hire.

Respondent counters that it would not have considered Stuart for hire under its non-discriminatory hiring policy. Briggs testified without contradiction that its hiring policy considers first candidates who have worked for Respondent, second individuals recommended by supervisors and persons Briggs has observed personally working on jobsites before it hires off the street. In the only instances where Respondent hired employees after November 2002, they were hired consistent with this policy. Briggs personally observed McJunkin's work on a jobsite and Miller was recommended by Supervisor Smith.

In *Quality Mechanical Insulation, Inc.*, 340 NLRB No. 91 (2003) and *Brandt Construction Co.*, 336 NLRB 733 (2001) hiring policies similar to Respondent's were found to be lawful. I find that Respondent's hiring policy was a valid non-discriminatory means of securing a qualified workforce. Since Stuart, unlike McJunkin and Miller, did not fall within one of the categories of applicants considered before applicants "off the street", the failure to consider Stuart did not violate the Act. I will recommend dismissal of this portion of the Complaint.

b. Tom Kennedy, Mark Sandy, Henry Arnoux, Ron Dahl,
Darren Konopaski and Dan Taylor.

Counsel for the General Counsel contends that on June 6, 2003, Respondent failed to consider Kennedy, Sandy, Arnoux, Dahl, Konopaski and Taylor for hire. On June 6, 2003, Kennedy, Sandy, Arnoux, Dahl, Konopaski, Taylor and Scheffer approached Respondent's office as a group, walking single file to apply for work as operators. As Kennedy, who was the first of the group to near the office door, Walker blocked his entry and said Respondent was not taking applications.

As in the case of Stuart, Counsel for the General Counsel contends that Respondent treated union applicants disparately from non-union applicants. As in Stuart's case, I find that Respondent gave non-union applicants greater access to its office than union applicants. I find Counsel for the General Counsel has established a prima facie case under FES that Respondent discriminatorily failed to consider Kennedy, Sandy, Arnoux, Dahl, Konopaski and Taylor for hire. The Respondent treated union applicants in a different manner than the non-union identified applicants who were permitted to enter Respondent's offices. Moreover, as noted above, there is a plethora of anti-union animus that has been directed toward Respondent's employees.

Like in Stuart's case Respondent argues that it would not have considered Kennedy, Sandy, Arnoux, Dahl, Konopaski and Taylor for hire under its hiring policy. There is no dispute that Kennedy, Sandy, Arnoux, Dahl, Konopaski and Taylor did not fall within any hierarchy of applicant Respondent considered for hire before walk in applicants. There is no evidence that Respondent has disparately applied its hiring policy at any time. Accordingly, I find that Respondent's failure to consider Kennedy, Sandy, Arnoux, Dahl, Konopaski and Taylor for hire did not violate the Act. I will recommend dismissal of this portion of the Complaint.

4. Respondent's Disparate Treatment of Union Applicants

Counsel for the General Counsel alleges that Respondent's disparate treatment of union applicants is an independent violation of the Act. Counsel for the General Counsel cites *Quality*

Mechanical Insulation, Inc., *supra* to support its argument that Respondent may not treat union applicants differently from non-union applicants. Initially, in *Quality Mechanical Insulation, Inc.*, the Board noted that there were no exceptions filed to the ALJ's finding that the employer did not discriminatorily fail to hire or consider for hire. While, Respondent may have not have given the union applicants access to its office, I have found that Respondent has uniformly applied its non-discriminatory hiring practice that gives priority to applicants other than those who walk in "off the street." In no case herein, was an applicant hired who applied "off the street" including Werner, Hassing or McKinney. Moreover, other than Hassing who was given an application in error as Respondent was not hiring, there is no evidence that any walk in applicant was allowed to fill out an application for employment with Respondent. Thus, there is no evidence that Respondent has treated union applicants in a disparate manner in its hiring process. Accordingly, I conclude that there has been no disparate treatment of union applicants established and I will dismiss that portion of the Complaint. *Brandt Construction Co.*, *supra*.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to immediately reinstate unfair labor practice striker Steven Scheffer to his former or substantially equivalent positions on his unconditional offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By telling Steven Scheffer that he would not be rehired because of his union activities and by threatening Steven Scheffer with physical violence, Respondent violated Section 8(a)(1) of the Act.

5. Respondent did not otherwise violate Section 8(a)(1) or (3) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Since the Respondent unlawfully failed and refused to reinstate unfair labor practice striker Steven Scheffer on his unconditional offer to return to work, I shall recommend that the Respondent be required to reinstate him immediately to his former position or, if that position no longer exist to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing if necessary any persons hired after May 15, 2003, and make the striker whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate him from the date of his offer to return to work on November 13, 2002. Backpay is to be computed in the manner prescribed in *F.W. Wolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

5 ORDER

The Respondent, T.E.Briggs Construction Company, Inc., Edmonds, Washington, its officers, agents, successors, and assigns, shall:

10 1. Cease and desist from:

(a) Failing and refusing to immediately reinstate unfair labor practice striker Steven Scheffer to his former or substantially equivalent positions on his unconditional offer to return to work.

15

(b) Threatening not to rehire employees because of their union activities.

(c) Threatening employees with physical harm because of their union activities.

20

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

25

(a) Offer unfair labor practice striker Steven Scheffer immediate and full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make the striker whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to immediately reinstate him on his unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

30

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and papers, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

35

40

45

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50

- 5 (c) Within 14 days after service by the Region, post at its facility in Edmonds,
Washington, copies of the attached notice marked "Appendix."²¹ Copies of the
notice, on forms provided by the Regional Director for Region 19, after being
signed by the Respondent's authorized representative, shall be posted by the
Respondent immediately on receipt and maintained for 60 consecutive days in
conspicuous places including all places where notices to employees are
customarily posted. Reasonable steps shall be taken by the Respondent to
10 ensure that the notices are not altered, defaced, or covered by any other material.
In the event that, during the pendency of these proceedings, the Respondent has
gone out of business or closed the facility involved in these proceedings, the
Respondent shall duplicate and mail, at its own expense, a copy of the notice to
all current employees and former employees employed by the Respondent at any
time since November 13, 2002.
- 15 (d) Within 21 days after service by the Region, file with the Regional Director sworn
certification of a responsible official on a form provided by the Region attesting to
the steps that the Respondent has taken to comply.
- 20 (e) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges
violations of the Act not specifically found.

25 Dated, San Francisco, California, April 8, 2004.

30

John J. McCarrick
Administrative Law Judge

35

40

45

50 ²¹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words
in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"
shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF
APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union,
Choose representatives to bargain with us on your behalf,
Act together with other employees for your benefit and protection,
Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against unfair labor practice strikers by failing and refusing to immediately reinstate them to their former or substantially equivalent positions on their unconditional offer to return to work.

WE WILL NOT threaten not to rehire employees because of their union activities.

WE WILL NOT threaten employees with physical harm because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer unfair labor practice striker Steven Scheffer immediate and full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of our failure to immediately reinstate him on his unconditional offer to return to work, with backpay and interest.

T.E. BRIGGS CONSTRUCTION COMPANY, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.